SUPREME COURT, U. S.
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No. 896

Supreme Court of the United States

OCTOBER TERM, 1968

ANDREW J. KALERAK, JR., *et al, Petitioners,*

vs.

WALTER J. HICKEL, Secretary of the Interior and

STATE OF ALASKA, *Respondents.*

MEMORANDUM OF RESPONDENT, STATE OF ALASKA, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the court of appeals is reported at 396 F.2d 746 (Pet. App. A, 1a-6a).

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1968, and a timely petition for rehearing was denied on September 23, 1968. By order of Mr. Justice Douglas, the time for petitioning for a writ of certiorari was extended until January 3, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Alaska Statehood Act of July 7, 1959 (72 Stat. 339) permitted the State of Alaska to select a quantity of Federal lands within the State to become State lands.

On January 8, 1963, the State of Alaska filed a formal selection application, A-058566, for 26,880 acres of land as part of its allotment under the Statehood Act (R. 179). The lands involved were deemed necessary as a future water source for the Greater Anchorage area. At the time of this application the lands were in part subject to paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, withdrawing them from all forms of appropriation for the protection of the water supply of the City of Anchorage (R. 178). The State's selection was posted in the appropriate land and status records (R. 179).

On April 8, 1963, the Department of the Interior issued Public Land Order 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of Public Land Order 576, *supra*. On the same day, April 8, 1963, the State filed an amendment to its application adding certain acreage to it. Three subsequent amendments were filed on May 24, 1964, and March 17, 1964.

On October 8, 1964, the Land Office at Anchorage issued a decision stating that the selected lands were then segregated from all appropriations under the Public Lands Laws and directing the State to publish a notice of its application in an Anchorage newspaper for five consecutive weeks (R. 181). This publication was accomplished within the time allowed (R. 181).

More than two years after the State's application, on May 27, 1965, Andrew Kalerak, Jr., filed a Notice of Location of Settlement of Occupancy Claim in Alaska, Anchorage 058566 (R. 181). The Land Office refused to accept the notice for recordation on the grounds it was in conflict with the State's selection.

Subsequent claims of the other petitioners were rejected on the same grounds.

Kalerak appealed to the Office of Appeals and Hearings where the decision of the Anchorage Land Office was reversed (R. 29).

The State of Alaska appealed to the Secretary of the Interior and the claims of the other petitioners were consolidated at that point (R. 177).

The Secretary of the Interior decided that the lands covered by the State selection were not open to the initiation of claims by settlement or location and that all attempts by petitioners to do so were invalid in light of the long-standing principle of segregation (R. 18).

Second, the Secretary decided that sound administrative and equitable considerations in view of the Interior Department's internal management and the broad Congressional policy implemented by the 90 day preference right provision of the Alaska Statehood Act (72 Stat. 339) led to the conclusion that Alaska's application, although premature, should be accepted (R. 25).

The United States District Court at Anchorage, after dutifully finding that the Secretary's decision was arbitrary, capricious, in excess of statutory right and without observance of procedure required by law, etc., reversed. Further appeal followed.

The Court of Appeals for the Ninth Circuit, recognizing the critical importance to the State of Alaska of protecting the future water supply of the State's

most populous area, reversed the lower Court and affirmed the decision of the Secretary of the Interior.[1]

The sole controversy arising from the entire official transaction in this case is whether or not the petitioners, by reliance on an alleged procedural defect, which could in no way act to their prejudice, can frustrate the basic purpose of transferring the public trusteeship of this vital mountainous watershed area from one sovereign to another so as to assure its conservation and freedom from contamination.

ARGUMENT
THE DECISION OF THE SECRETARY OF INTERIOR WAS IN ALL RESPECTS REASONABLE, LEGAL AND IN ACCORDANCE WITH POLICY ADOPTED BY THIS COURT

In *Lassen v. Arizona ex rel. Arizona Highway Department,* 385 U.S. 458, 17 L.Ed.2d 515 (1967), this Court had occasion to construe a Congressional land grant to the State of Arizona for the benefit of certain institutions in that State. The act involved express limitations upon the manner of disposition of those lands. Those limitations, however, in light of the purposes of the Act and the abuses which the restrictions were intended to prevent, were found to have no reasonable application to the land transfer intended in that case. This Court, recognizing that to require Arizona to follow precisely the procedures of the Act would be to sanction an empty formality, concluded that it was consonant with the Act's essential purpose

[1] The Court of Appeals found it unnecessary to rule on the Secretary's alternative ruling which recognized that Alaska's original application, even if defective, accomplished a segregation of the lands in question which prevented petitioners from acquiring rights therein while the segregation remained in effect.

to exclude the transfer there in issue from the restrictions imposed by Congress.

In the case now before the Court it is undisputed that Alaska filed an application in proper form for the watershed lands.[2] A fraction of the watershed acreage, those parcels claimed by petitioners, were not eliminated from withdrawn status until twelve weeks later when P.L.O. 576, insofar as it affected the lands involved in this litigation, was revoked. P.L.O. 3022, 28 F.R. 3661. The new public land order set out the three month preference right in favor of the State of Alaska as was required by the Alaska Statehood Act (72 Stat. 339). During these three months, a period in which all other potential applicants were absolutely barred from selecting these lands, Alaska twice amended its application to include additional lands. These amendments expressly referred on their face to the original application by precise Bureau of Land Management number, Anchorage 058566, and thereby incorporated the original application by express reference.[3]

Reduced to its lowest denomination, the contention of petitioners is that failure on the part of Alaska to retype its original letter of application and refile same[4] with the amendments during the ninety (90) day preference right period must defeat the attempt to transfer this critical watershed area from one sovereign to another, via a procedure suggested and accepted by the Bureau of Land Management, in

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[2] The application is a simple typed letter describing the lands requested.
[3] Each amendment was accomplished by simple typed letter. See Appendix "A."
[4] It appears that filing of a carbon copy or photo copy of the original application during the preference right period would have equally satisfied the alleged technical defect.

favor of petitioner's applications which were initiated more than two years later.

For reasons shown below, the watershed transfer here involved in no way contravenes the reasons for the rules by which petitioners seek to defeat it or admits of the abuses which those rules were intended to prevent. To require adherence to those rules, if in fact they were violated, would in the facts of this case saction an empty formality in a manner rejected by *Lassen v. Arizona, supra.*

THE LIMITATIONS UPON PREMATURE FILING HAVE NO RATIONAL APPLICATIONS TO ALASKA'S WATERSHED SELECTION

The primary and compelling reason for the restriction on premature filing is to assure all members of the public an equal opportunity to file on public lands as they become available (R. 189). That is, it would be inequitable to give effect to a premature application because this would be equivalent to granting a preference right to the early applicant. The inequity ordinarily involved in allowing an applicant to file for land while it is still withdrawn is illustrated in *State v. Arizona,* A-18816 (October 16, 1935).[5]

A second objection to premature filing is the potential administrative burden which could result. If premature filings on withdrawn land generally were permitted the public land records could become burdened with thousands of applications, possibly for the same or overlapping parcels, which the Land Office would have to clear. See *J. G. Hathaway, et al,* 68 I.D. 48, 52 (1961) (R. 189).

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[5]See page 15, Decision of the Secretary of the Interior below, R. 191.

These reasons for generally applying the rule against premature filing are compelling. The question is whether the reasons for the general rule exists in this case. Where, as here, the reasons have no rational application to the facts, application of the rule is meaningless.

Since the State of Alaska was the only applicant allowed to file "prematurely" under the procedure suggested by the Bureau of Land Management for transfer of the watershed no undue administrative burden could have been imposed on the land office. As the decision of the Secretary of the Interior below points out there was no possibility that hundreds of other applicants would clutter the record with their premature filings. Petitioner's suggestion that Alaska alone would "clutter the records" of the land office with premature filings is pure fantasy unsupported by any fact obtaining either before or after the transfer herein in question and contrary to all experience under the Alaska Statehood Act.

More significant is whether the premature application of Alaska was inequitable. Any possibility of inequity is removed by the following fact: The State of Alaska had a statutory preference right to all lands restored from withdrawal, granted to it by Section 6(g) of the Alaska Statehood Act (72 Stat. 339). Thus, the fact that Alaska filed on land before it was restored was in no way inequitable as to the rights of petitioners or any other potential applicant.

Clearly, the reasons underlying the general rule on premature filings did not apply in this case and the decisions below have been correct in not applying that

rule.[6] See, *Chapman v. Sheridan, Wyoming Coal Co.*, 338 U.S. 620 (1950), approving the Secretary of the Interior's interpretation of his regulations.

PROCEDURAL DUE PROCESS IS NOT IN ISSUE

Petitioners apparently contend at several points in their brief that certiorari should be granted in this case to correct some alleged violation of the rule established by this Court in *Accardi v. Shaughnessy*, 347 U.S. 260 (1965), and *Service v. Dulles*, 354 U.S. 363, relative to the binding character of administrative regulations. Both cases dealt with administrative proceedings directly against the vital personal interests of *Accardi*[7] and *Service*[8] and to which they were parties.

Administrative actions adverse to each of these parties, obtained without observance of applicable regulations, were reversed by this Court in order to assure that the parties "will have been afforded that due process required by the regulations." *Accardi v. Shaughnessy, supra*, at 268.

The issues and the relationship of the parties here are in no way similar. Alaska completed its application and relevant amendments by early in 1963. The State's selection was posted in the appropriate land and status records the same year (R. 179). Publication of notice was accomplished in a timely manner (R. 181), pursuant to a Land Office decision of October 8, 1964 (R. 181). Not until late in May of 1965,

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[6] For other cases where the Department of Interior has properly given effect premature filing see: *Hunt v. State of Utah*, 59 I.D. 44 (1945); *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193 (1916).

[7] The proceedings against Accardi were to effect his deportation from the United States.

[8] The United States State Department proceeded against Service to terminate his employment for alleged security violations.

some two years after the State's application was perfected, did the earliest of the petitioners file his original notice (R. 181). The administrative procedures utilized to transfer the watershed involved here, procedures to which petitioners were not parties, bear no reasonable relationship in kind or in time to the denials of procedural due process found in *Accardi* and *Service.*

THE DECISION BELOW IS OF NARROW SCOPE AND ARISES FROM A FACT SITUATION WHICH DOES NOT APPEAR TO HAVE ARISEN ELSEWHERE

The petitioners' assertion that the decision below has widespread implications beyond the limits of the watershed sought by Alaska is simply not supported by fact.

The Court of Appeals recognized that action by the State of Alaska during its ninety (90) day preference right period was essential to Alaska's successful selection of the previously withdrawn lands. Absent appropriate action during that ninety (90) day period, no selection could have been accomplished by the State. Thus, there is nothing whatsoever in the opinion below to suggest that Alaska could select even one acre of withdrawn land and petitioners fear for the "many millions of acres" (Petitioners' Br. p. 18) constitute only a little puffing. The thrust of the opinion below is clear: If Alaska is to select so much as an acre of land of a previously withdrawn status, it must perfect its selection within ninety (90) days of the date that land become available.[9]

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[9] Alaska could, of course, make a selection after the ninety (90) day preference period but only on the same basis as any other potential applicant.

This preferential treatment afforded the State of Alaska does not eminate from the Secretary of the Interior as suggested by the petitioners, but from the unequivocal terms of the Alaska Statehood Act by which Congress made available the assets with which the new State could establish and maintain a government.

The interest of the State of Alaska, and in particular of the present and future residents of its most populous area, in obtaining title to the watershed in issue is admittedly substantial. No doubt the interest of the petitioners in defeating the State's claim is equally substantial as they anticipate great profits from potential subdivision and sale or other utilization of these lands. But to say that the case is of wider scope or that it "effects the operation of the system of land management as a whole" is mere advocacy.

Perhaps no set of regulations can be ideally designed to answer all questions which arise under them with clarity and finality and without resort to human reasoning. The Secretary of the Interior reached an entirely reasonable conclusion based upon the applicable regulations and the rationale which underlines them. Nowhere does there appear any arbitrary decision which would warrant review of the Secretary of the Interior or the Court of Appeals.

CONCLUSION

Absent a showing that the Secretary of the Interior acted arbitrary or illegally or that a similar fact situation will ever again arise, there is no such substantial question as would warrant *Certiorari.*

DATED at Anchorage, Alaska this 10th day of February, 1969.

Respectfully submitted,

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APPENDIX A

STATE OF ALASKA, William A. Egan, *Governor*
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LANDS
344 6th Avenue, Anchorage

March 12, 1964

Bureau of Land Management
Anchorage Land Office
Sixth and Cordova
Anchorage, Alaska

Ref: S-1209, City of
Anch. Watershed
Anch. 058566

Gentlemen:

Reference is made to State selection application, Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are additional open lands within the general boundaries of the selection. The State of Alaska hereby requests that its application be amended to embrace all available lands within the following described townships:

T. 11 N., R. 2 W., SM
Sec. 4: Lots 1, 2, 3, 4, S½N½, SW¼, SE¼
Sec. 5: Lots 1, 2, 3, 4, S½N½, SW¼, SE¼
Sec. 7: Lots 1, 2, 3, 4, E½W½, NE¼, SE¼
Sec. 8: All
Sec. 9: All
Sec. 18: Lots 1, 2, 3, 4, E½W½, NE¼, SE¼
Containing Approx. 3,777.66 acres

Those lands described in BLM opening order dated Feb. 14, 1964.

Thank you for your co-operation.

Sincerely yours,
ROSCOE E. BELL, *Director*
By: /s/ John E. Friberg
John E. Friberg,
Acting Selection Officer

CMF:bm
cc: Lands & Minerals
Officer Records